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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of)

221(b) and 332 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §§ 152(b), 221(b) and 332, and would improperly preempt state regulation. Several commentors have agreed with this observation.

In particular, BellSouth Corporation (BellSouth) correctly notes in its comments (at page 2) that "the channel exclusivity violated Section 332 of the Communications Act by eliminating the 'last functional distinction' between private and common carrier paging systems." [footnote omitted]. BellSouth further noted that the NPRM improperly ignores this issue by simply stating that "such an inquiry, if appropriate, is beyond the scope of this proceeding." Id at page 3. BellSouth also cites to the "extraordinary regulatory burdens" which will continue to saddle common carrier paging providers while private carrier paging operations (PCPs) have all obstacles removed. Id at page 5.

Similarly, McCaw Cellular Communications, Inc. (McCaw) correctly observes that, if the Commission's proposal is adopted (along with its related proposal to eliminate PCP eligibility restrictions in PR Docket No. 93-38), "there will be essentially no difference between the service that Part 90 PCP licensees and Part 22 common carrier licensees may provide." (McCaw comments at page i.) McCaw goes on to observe as follows:

> Despite the equality of service offerings the FCC's regulatory scheme for Part 22 and Part 90 carriers remains inequitable. For example, Part 22 common carriers are subject to state regulation while Part 90 PCP licensees are not; Part 22 common carriers are subject to longer application processing procedures than are Part 90 PCP licensees; and Part 22 common

> carriers may not take advantage of slow growth implementation procedures available to Part 90 PCP licensees. These factors and others will make it significantly easier for PCP licensees providing 900 MHz paging services to deploy systems and respond to the marketplace more quickly than their Part 22 counterparts.
>
> Id.

Telocator generally supports the Commission's proposal, but cites to the disparity in treatment of PCPs and common carriers, and urges the Commission to "remove regulatory burdens on radio common carriers ("RCCs") providing functionally similar competing services."

Thus, BellSouth and McCaw (two of the largest providers of mobile radio and paging services in the country) and Telocator (a large organization of mobile radio service providers) agree with Radiofone that the Commission has utterly failed to address the most significant legal issue raised in this proceeding, namely, the harmful, anti-competitive impact which PCP exclusivity (coupled with unrestricted PCP eligibility) will have on common carrier paging service. Radiofone supports BellSouth's call for the Commission to reject its proposal. BellSouth comments at page 1.

McCaw and Telocator take a somewhat different approach. McCaw states that the Commission "should withhold acting on this proceeding until it establishes a regulatory framework which regulates essentially similar service providers in a manner which allows full and fair competition." McCaw comments at page i. See Telocator comments at p. 1. While Radiofone agrees with this sentiment, it does not entirely agree with the proposed solution. The Commission may not overstep its statutory boundaries in trying

to create a level playing field, by overriding the legitimate interest of and powers reserved to the states in the regulation of services to their respective citizens. As Radiofone points out in its May 6, 1993 comments (at pp. 7-15), Congress has reserved to the states the right to regulate economic aspects of intrastate paging services, so that the states can protect their citizens (especially individual consumers) against service scams, substandard services, and the ill effects of ruinous competition. It is respectfully submitted that it is beyond the Commission's authority to override this reservation of power to the states; and that it would not serve the public interest to impair the states' ability to protect its citizens.

It is also respectfully submitted that, while the Commission attempts to avoid this issue concerning common carriage by labeling it "beyond the scope of this proceeding", it would be arbitrary and capricious to adopt the proposed exclusivity rules without first resolving this issue. The Commission "has a statutory duty to accord 'consideration' to relevant comments submitted for the record by interested parties. See 5 U.S.C. § 553(c) (1982)." Nat. Small Shipments Traffic Conf., Inc. v. I.C.C., 725 F.2d 1442, 1451 (D.C. Cir. 1984). Under the Administrative Procedures Act, the FCC must consider "relevant matter presented" in a rule making proceeding. 5 U.S.C. § 553(c) (1982). Indeed, "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." Home Box Office v. F.C.C., 567 F.2d 9, 35 (D.C. Cir. 1977).

Comments that, if true would change an agency's procedure are relevant. Id. at n. 58. Comments regarding the effect on common carriage, if true, would change Commission procedure, since improper preemption of state regulation potentially is fatal to any rules adopted in this proceeding. See, e.g., Louisiana Public Service Comm'n v. F.C.C., 476 U.S. 355 (1986). Moreover, the harmful effect of the Commission's proposal on the ability of common carriers to compete and provide valuable services to the public, as described by several commentors, dictates that the Commission resolve this issue before it can find that the public interest will be served by adopting the proposal rules. A reviewing court must assure itself that all relevant factors have been considered by the agency. Citizens to Preserve Overton Park, Inc., v. Volpe, 401 U.S. 402, 416 (1971). A reviewing court would examine whether the Commission had adequately considered preemption issues, and the public interest, since improper preemption or failure to consider the public interest may lead to reversal or remand, which certainly would change the Commission's procedures. Thus, the effect of proposed rules on common carriage and state regulation is "relevant" under the APA. As such, these issues are within "the scope of this proceeding," and should be addressed by the Commission.

II. THE COMMISSION SHOULD NOT EXTEND EXCLUSIVITY TO THE LOWER PCP BANDS.

Porta-Phone and CelPage, Inc. both urge the Commission to extend its exclusivity proposal to all PCP bands, rather than

restricting it to 900 MHz operations. See Porta-Phone comments at pp. 7-10; CelPage comments at pp. 7-9. The Commission has declined to do so, citing the fact that PCP channels below 900 MHz have become too congested to allow exclusive channel assignment. See id at page 3; NPRM at paras. 6, 39. As discussed in Section IV below, Radiofone agrees with the commentors who have suggested that the Commission's proposal will have anti-competitive consequences. However, exclusivity for all PCP bands is not the solution. Instead, maintaining the shared status of the 900 MHz band is the appropriate response.

While these parties "disagree" with the Commission's assumption concerning crowding on the lower bands, they have not adequately addressed the problems that will be created by exclusive licensing of channels where there are already multiple licensees on each frequency. Moreover, while these commentors express concern about the anti-competitive effects of granting exclusivity to only the 900 MHz PCP band, it would appear anti-competitive to implement the exclusive licensing of all PCP frequencies, since this may drastically reduce the number of available frequencies, thereby preventing small business operators from obtaining access to a channel -- particularly if Congress enacts the "license-to-the-highest-bidder" legislation now under consideration. Under the current regime, such users can share frequencies.

More importantly, the proposal to extend exclusivity to other PCP bands should be rejected for the same reasons which require the abandonment of the exclusivity proposal altogether. Whether in the

900 MHz band or in all PCP bands, exclusivity will undermine the viability of common carriers and unlawfully preempt state regulatory powers.

III. THE COMMISSION SHOULD NOT INCREASE THE PERMITTED POWER FOR PCPs TO 3500 WATTS.

The National Association of Business and Educational Radio, Inc. (NABER) and American Paging, Inc. (API) urge the Commission to increase the permitted effective radiated power (ERP) to 3500 watts for PCPs. See NABER comments at page 9; API comments at pp. 9-10.[1] Radiofone opposes such power increase, especially if the Commission's exclusivity proposal is adopted. The increased power limit will only exacerbate the advantage that would be enjoyed by PCPs due to the regulatory constraints on common carriers (as discussed above). This is particularly true since the proposed power increase for common carriers has not been adopted, and may not be adopted until well after the termination of the above captioned docket, if at all.

IV. COMMENTORS HAVE RAISED VALID CONCERNS AS TO THE ANTI-COMPETITIVE IMPACT OF EXCLUSIVITY ON SMALL CARRIERS.

Porta-Phone, CelPage, Inc. and Atlanta Voice Page, Inc. all raise concerns as to whether the exclusivity proposal "would create vast inequities in the PCP industry." Porta-Phone comments at page 2. These carriers are concerned about "the likelihood of 900 MHz

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[1] NABER cites to the fact that 3500 watts has been proposed as a limit for common carrier paging systems in the 900 MHz band. Id.; See Notice of Proposed Rulemaking, CC Docket No. 93-116, FCC 93-188, 58 FR 25962 (April 29, 1993).

PCP domination by a few large operators." Id at page 7. According to CelPage, "those larger carriers able to more easily obtain large amounts of capital, will likely be granted many of the available exclusive channels." CelPage comments at page 4.

Radiofone agrees that the creation of exclusive use 900 MHz carriers is likely to have anti-competitive consequences for both the PCP and common carrier industries, and disagrees with the claim in the Initial Regulatory Flexibility Analysis that "the proposal would not affect the status of existing systems." NPRM at Appendix B. The creation of large exclusive use wide-area 900 MHz systems, with regulatory advantages over their common carrier counterparts, will make it difficult for small business entities to operate as either common carriers or private carriers. In this regard, it appears that the Commission has failed to properly address the impact of its proposal on small businesses under the Regulatory Flexibility Act (Pub. L. No. 96-354, 194 Stat. 1164 (1980).

regulation in the form of higher prices. Thus, while the most immediate and visible impact may fall to the small entrepreneur, the public shares the burden.

126 Cong. Rec. 24,575, 24,588.

The Commission's proposed exclusivity plan, which would

CONCLUSION

WHEREFORE, it is respectfully requested that the Commission abandon the proposed action awarding exclusive paging frequencies to private carrier paging systems.

Respectfully Submitted,

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